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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-236

HARRY R. HALDEMAN, PETITIONER

v.

HONORABLE JOHN J. SIRICA,
UNITED STATES DISTRICT JUDGE,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The court of appeals filed no opinion (Pet. App. 3a).[1] The opinion of the district court (Pet. App. 1a-2a) is not yet reported.

[1] Judge MacKinnon wrote a short statement saying that he would have required a response from the Special Prosecutor.

JURISDICTION

The order of the court of appeals denying mandamus was entered on August 14, 1974. The petition for a writ of certiorari was filed on September 5, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly denied a pretrial petition for a writ of mandamus seeking a dismissal of the criminal indictment in the "Watergate cover-up case", *United States* v. *Mitchell, et al.*, on the ground that the delegation of power by Congress to this Court to promulgate rules of procedure precluded Congress from subsequently enacting a statute to extend the term of the grand jury that later returned the indictment.

STATEMENT

On March 1, 1974, petitioner and six others were indicted in the United States District Court for the District of Columbia,[2] and charged with various offenses including a conspiracy to defraud the United States and to obstruct justice in connection with the earlier "Watergate break-in" case.[3] The indictment was returned by a grand jury empaneled on June 5, 1972, whose term would ordinarily have expired on

[2] *United States* v. *Mitchell, et al.*, D.D.C. Crim. No. 74-110.

[3] *United States* v. *Liddy, et al.*, D.D.C. Crim. No. 1827-72.

December 4, 1973, pursuant to Rule 6(g) of the Federal Rules of Criminal Procedure.

On October 16, 1973, prior to the expiration of the grand jury's term, the Attorney General, at the request of the Special Prosecutor, supported the introduction of a bill, H.R. 10937, 93rd Cong., 1st Sess., to extend the term of the grand jury. The special legislation was sought in order to provide the grand jury with an opportunity to examine and consider the subpoenaed Presidential tapes which had been ordered produced in accordance with the procedures established in *Nixon* v. *Sirica*, 487 F.2d 700 (D.C. Cir. 1973), and to continue and complete its investigation of the so-called Watergate affair. The Attorney General explained that special legislation was being sought because of the "unusual constitutional litigation . . . the character of the crimes, the potential defendants, and the questions of public confidence that they raise." The proposed legislation was also premised on the fact that the grand jury in question had heard dozens of witnesses whose testimony, over the course of an investigation that had spanned more than 15 months, was recorded in thousands of pages of transcript. The original bill would have authorized periods of extension upon a finding by the court that the grand jury had not completed its business. Congress on its part "concluded that the necessity for the extension is so clear and compelling that there is no need to make the initial extension discretionary." Senate Report No. 93-527, pp. 1, 3-4; House Report No. 93-618, 93rd Cong.,

1st Sess., pp. 2-4. On November 30, 1973, the measure was signed into law by President Nixon as Public Law 93-172. On December 3, 1973, the district court entered an order in accordance with the new statute declaring the term of the grand jury extended to June 4, 1974.[4]

On March 1, 1974, after examining the Presidential tapes and hearing other evidence, the grand jury returned the indictment. Thereafter, petitioner filed a motion to dismiss the indictment, alleging that Congress, having previously enacted legislation delegating to this Court the power to prescribe rules of criminal procedure, 18 U.S.C. 3771, did not retain any authority to modify any of the rules promulgated under that delegation, including Rule 6(g), Fed. R. Crim. P. and that, therefore, the statutory extension of the term of the grand jury was a nullity. On July 9, 1974, the district court rejected this contention.

On July 16, 1974, petitioner filed a mandamus petition in the court of appeals raising the same challenge to congressional power to modify one of the Criminal Rules by subsequent legislation. On August 14, 1974, the court of appeals *en banc* denied this petition without requesting any response. (Judge MacKinnon noted that he would have had the Spe-

[4] Under the authority provided by the statute and upon the affirmative vote of the grand jury that it had not yet completed its business, the district court on May 31, 1974, entered an order further continuing the term of the grand jury to and including December 4, 1974. That extension is not at issue here.

cial Prosecutor express his position on whether the legislation extending the life of the grand jury constituted a denial of due process.) The petition for a writ of certiorari followed.

ARGUMENT

In *United States* v. *Nixon*, —— U.S. ——, decided July 24, 1974, this Court reaffirmed the long-standing policy of finality as a prerequisite for review of lower court decisions. It said: "The finality requirement of 28 U.S.C. § 1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals. * * * This requirement ordinarily promotes judicial efficiency and hastens the ultimate termination of litigation." It is also settled that the strong policy against interlocutory appeals cannot be evaded by resort to the use of the extraordinary writs, as in the present case. See, *e.g.*, *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30 (1943). Mandamus only issues in "exceptional circumstances, amounting to a judicial 'usurpation of power'." *Will* v. *United States*, 389 U.S. 90, 95 (1967).[5] Here, as we show below, there was no "usurpation of power" since respondent judge prop-

[5] This is the third time that one or more of the defendants in the pending Watergate case have sought extraordinary writs. See *Mitchell* v. *Sirica*, No. 73-2001, Oct. Term, 1973, *cert. denied*, July 25, 1974; *Ehrlichman* v. *Sirica*, No. A-93 Misc. this term, application for a stay of trial denied, August 28, 1974.

erly concluded that the congressional delegation of power to this Court to prescribe rules of criminal procedure nevertheless was subject to Congress's residual authority to amend or modify any of the rules so promulgated.

Petitioner does not deny that Congress has the power to enact rules of procedure for the federal courts.[6] Under this power, Congress has delegated to this Court the power to enact rules of criminal procedure both before and after verdict, 18 U.S.C. 3771 and 3772. This legislation, adopted in 1940, provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Pursuant to this legislation, this Court promulgated the Federal Rules of Criminal Procedure, including Rule 6(g) providing that no regular grand jury may serve more than eighteen months.

The language that "[a]ll laws in conflict with such rules shall have no further force or effect" certainly manifests an intent to replace pre-existing procedural legislation on the same issues. But it does not suggest that Congress intended that any future procedural legislation it might consider it appropriate to enact would be a nullity. Nothing in the terms

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[6] See *Funk* v. *United States*, 290 U.S. 371, 381-382 (1933); *Palermo* v. *United States*, 360 U.S. 343, 353, n. 11 (1959). In the exercise of this power, Congress had enacted earlier statutes to regulate and to extend the length of the terms of federal grand juries. See *United States* v. *Johnson*, 319 U.S. 503, 507-513 (1943); *Stillman* v. *United States*, 177 F.2d 607, 611, n. 2 (9th Cir. 1949).

or history of the Enabling Act even implies that Congress did not retain any authority to modify the rules promulgated by this Court under this delegation. Indeed, the fact that no rule prescribed by this Court takes effect until reported to Congress, suggests that Congress intended to retain the ultimate power to act in this area, and there is no reason to conclude that the failure of Congress to modify or cancel a proposed rule at that time forever prohibits Congress from acting on the matter. Even if the language of the 18 U.S.C. 3771 were ambiguous, it would require a clear manifestation of congressional intent to conclude that Congress placed an impediment on its power to legislate (assuming *arguendo* that one Congress could validly prevent a later Congress from taking independent action).[7] And petitioner's argument that Congress had to repeal the Enabling Act entirely or to amend it to *authorize* its enactment of modifications of the Federal Rules (Pet. 13) is simply unsupportable.

Both Congress and the courts have concluded that the promulgation of the Criminal Rules has not re-

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[7] Petitioner refers to a 1938 Senate Report interpreting the 1934 Enabling Act applicable to the promulgation of Civil Rules which states that with the adoption of the Civil Rules "all acts of Congress heretofore passed, and possibly to be enacted hereafter, i.e., regulating practice in the Federal courts, shall no longer be in effect." (Pet. 7) But the fact that this after-the-fact report expressed the "possibility" that statutes thereafter passed might have no effect on the Civil Rules is no indication of congressional intent to try to restrict Congress's power to enact statutes applicable to criminal procedure.

stricted the power of Congress to alter those rules by statute. The lower courts have uniformly ruled that a subsequently enacted statute modifies a criminal rule previously adopted by this Court. See *United States* v. *Moon*, 491 F.2d 1047, 1050 (5th Cir. 1974) (18 U.S.C. § 2518(10)(a) and Rule 41(e)); *Government of Virgin Islands* v. *Parrott*, 476 F.2d 1058, 1060 (3rd Cir. 1973), *cert. denied*, 414 U.S. 871 (1973) (Revised Organic Act of the Virgin Islands and Rule 23(a)); *United States* v. *Issacs*, 351 F. Supp. 1323, 1328 (N.D. Ill. 1972), affirmed, 493 F.2d 1124 (7th Cir. 1974), *cert. denied*, June 17, 1974 (18 U.S.C. 3500 and Rule 16(b)). See also 2 Moore, *Federal Practice* ¶ 1.02(5); 7 Moore, *Federal Practice* ¶ 86.04 [4]; *Palermo* v. *United States*, 360 U.S. 343, 353, n.11 (1959); *Hawkins* v. *United States*, 358 U.S. 74, 78 (1958); *United States* v. *Gustin-Bacon Div. Certain-Teed Prod.*, 426 F.2d 539, 542 (10th Cir. 1970).[8] Recently in the Organized Crime Control Act of 1970, 18 U.S.C. 3331-3334, Congress even provided for special grand juries whose term may be extended beyond the 18-month term normally specified by Rule 6(g) of the Federal Rules.

Petitioner attempts to distinguish these rulings by suggesting that Rule 26 of the Federal Rules of Criminal Procedure contains a special and *limited* recognition of continuing congressional power. That

[8] Other examples of procedural legislation enacted subsequent to the Federal Rules are 18 U.S.C. 3501 (admissibility of confessions), 18 U.S.C. 3502 (admissibility in evidence of eye witness testimony), 18 U.S.C. 3503 (depositions to preserve testimony) and 18 U.S.C. 3504 (litigation concerning sources of evidence).

Rule provides in part that the "admissibility of evidence and the competency and privileges of witnesses shall be governed, *except when an act of Congress* or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" (emphasis added). Apart from the fact that the cases cited above have not been concerned only with statutes altering evidentiary rules, the plain meaning of Rule 26 is that the Court was not at that time adopting any detailed rules of evidence but was leaving such matters to statute and common law principles. In any event, it is certainly anomalous to construct a situation in which Congressional power to legislate depends upon this Court's granting of permission to do so in the exercise of a power that is itself conferred upon the Court by Act of Congress.[9] Significantly in 1972, this Court found it necessary to amend Rule 6(b)(2), Fed. R. Crim. P., dealing with motions to dismiss an indictment because of objections to the grand jury selection, in order to incorporate the procedure provided by the intervening enactment of the Jury Selection and Service Act of 1968.[10]

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[9] Unlike the situation in *United States* v. *Nixon, supra,* where the Attorney General had not revoked the operative regulation, Congress here did explicitly supersede the rule involved.

[10] Nothing in *Davis* v. *United States,* 411 U.S. 233, 241-242 (1973) upon which petitioner relies is contrary to our argument here. The Court merely said:

[Footnote continued on page 10]

Finally, petitioner argues that this is "spot amending" and a "single piece of novel legislation in the *name of expediency," (Pet. 13), apparently suggest*ing without discussion the issue raised by Judge MacKinnon about whether this legislation constituted a denial of due process. See statement of Judge MacKinnon (Pet. App. 3a). But due process could be violated only if the instant legislation were arbitrary or if the special treatment were not rationally justified by legitimate concerns. *Cf. United States* v. *Berrigan*, 482 F.2d 171, 179 (3d Cir. 1973). Here, as we pointed out in our statement, the "unusual constitutional litigation . . . the character of the crimes, the potential defendants, and the questions of public confidence that they raise" justified Congress in enacting the statute at issue. It follows, therefore, that Congress had the authority to extend the life of the grand jury which indicted petitioner even though Rule 6(g) obviously limits the life of a regular grand jury to eighteen months.

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[10] [Continued]

Were we confronted with an express conflict between the rule and a *prior statute*, the force of § 3771, providing that "[a]ll laws in conflict with such rules shall be of no further force or effect," is such that the *prior inconsistent statute* would be deemed to have been repealed. *Cf. Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 10 (1941). (Emphasis added.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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